BEFORE

THE PUBLIC SERVICE COMMISSION OF

SOUTH CAROLINA

DOCKET NO. 2018-364

Stephen and Beverly Noller and Michael and Nancy Halwig, Complainants, v. Daufuskie Island Utility Co., Inc., Respondent.	**BRIEF ON JURISDICTIONAL MATTERS BY RESPDONENT DAUFUSKIE ISLAND UTILITY CO., INC.**

INTRODUCTION AND SUMMARY

On November 16, 2018, Michael and Nancy Halwig and Stephen and Beverly Noller (collectively "the Complainants" or "the Plaintiffs") submitted via their legal counsel a letter to Mr. Chad Campbell of the Office of Regulatory Staff. The letter included Individual Complaint Forms signed by Michael Halwig, Nancy Halwig, and Beverly Holler who own property on Daufuskie Island, South Carolina. The three identical Individual Complaint Forms allege that after Hurricane Matthew destroyed the water and sewer mains that serve part of Driftwood Cottage Lane, Daufuskie Island Utility Company, Inc. ("DIUC") did not install new mains to reestablish service to their homes at 46 and 36 Driftwood Cottage Lane.

After the parties submitted prefiled testimony, but before any hearings, the Commission requested the parties submit briefs addressing whether the Commission has jurisdiction over this matter. As more fully set forth herein, the Commission lacks jurisdiction to hear this matter or to provide the relief requested by the Complainants.

STATEMENT OF UNDISPUTED FACTS

"Plaintiffs are John and Nancy Halwig, the owners of 46 Driftwood Cottage Lane, Daufuskie Island, Beaufort County, South Carolina, and Beverly and Stephen Noller, the owners of 36 Driftwood Cottage Lane, Daufuskie Island, Beaufort County, South Carolina." Complaint accepted for processing by the Office of the Commission Clerk on November 26, 2018 (hereinafter "Complaint") at 6. "Plaintiffs' properties are within Melrose Plantation on Daufuskie Island. The Driftwood Cottage Lane area within Melrose has suffered from Hurricane Matthew which struck on October 8, 2016." *Id.*

"As a result of the erosion from Hurricane Matthew, a portion of Driftwood Cottage Lane was washed out, and with it water and sewer mains owned by Daufuskie Island Utility Company." *Id.* "While the homes to the south of the washout on Driftwood Cottage Lane continued to have service from DIUC, the homes and lots north of the washout, particularly the homes of John and Nancy Halwig and Beverly and Stephen Noller, did not." *Id.*

The same roadway and DIUC infrastructure were destroyed by a previous hurricane. After that storm, the Melrose Property Owners Association ("MPOA"), rebuilt Driftwood Cottage Lane, DIUC re-installed infrastructure and resumed water and sewer service to the Customers. Answer at 1. Following Hurricane Matthew, however, the MPOA determined it was too risky to rebuild the roadway again. *Id.* DIUC consulted with ORS and understood that since the roadway and the associated utility easement had washed into the sea, DIUC was not obligated to purchase additional easements to install for a third time infrastructure to serve these two customers on Driftwood Cottage Lane. DIUC applied standard rate setting and utility management principles and determined it would not be prudent to expend other ratepayers' funds to acquire a new easement and then reconstruct services two these homes; furthermore, the homes at issue lack any significant

protection from erosion and equipment installed would not last very long at all before again being destroyed by erosion. *Id.*

On or about November 8, 2016, the Halwigs submitted a Consumer Complaint/Inquiry Form to ORS; the current Complaint characterizes the submission as "regarding the refusal of DIUC to restore service [following Hurricane Matthew]." Complaint at 6. ORS responded via letter dated December 2, 2016. *Id.* (citing ORS file #2016-W-1682). No appeal or further request of action by the Commission was pursued by Halwigs at that time. The instant matter was initiated by the filing of a Complaint that on November 26, 2018 was accepted for filing by the Office of the Commission Clerk. *See generally* Commission Docket 2018-364-WS.

The Complainants assert that because of DIUC's decision not to install new "mains and utilities, [the Complainants were] required to find an alternate route for mains to replace the one disconnected at the washout of Driftwood Cottage Lane to the remainder of the mains under Driftwood Cottage Lane." Complaint at 6. "[T]he Halwigs and Nollers persevered and eventually were able to get the former lender and now owner of the Melrose Golf Course to agree to [an] easement to allow the lines to be installed near the 17th hole of the golf course." Complaint at 7.

"Once the Halwigs and Nollers obtained the easement, the water and sewer mains could be installed through the golf course property." Complaint at 7. The Complainants then coordinated and managed installation of new mains and infrastructure to connect their homes to the DIUC system via lines installed away from the immediate threat of erosion; "all costs of engineering, permitting and installation were paid by [the] customers to the engineers and contractors and agencies for the replacement mains." Complaint at 3.

After the Complainants had already begun installation of the new lines, DIUC and the Complainants entered into a Customer Service Agreement ("CSA"). *See* Complaint Exhibit, CSA

at p. 1. The CSA "provides that the Halwigs and Nollers were to install the mains at their own expense." Complaint at 7. "The Customer Service Agreement required the Halwigs and the Nollers to provide DIUC with the easement, invoices related to the costs that they were incurring at their own expense, and 'as built' drawings prepared by a licensed surveyor." Complaint at 7. The CSA, as the Complainants admit, "detailed the terms under which DIUC would provide service to the Halwigs and the Nollers." Complaint at 7.

The CSA included the following provisions:

> This Customer Agreement is necessary because of severe and continuous storm and tidal ocean erosion that destroyed the section of road located between 22 and 33 Driftwood Cottage Ln, containing Daufuskle Island Utility Company's ("DIUC") water and sewer facilities. Because these facilities could not be replaced as originally designed, DIUC is unable to provide service to customers located at 36 & 46 Driftwood Cottage Ln ("Customers").
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> In order to protect other customers from sharing in the cost responsibility, it would be the responsibility of the affected Customers to have the Project Mains installed in accordance with the plans they solicited from Thomas & Hutton, at their cost.
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> ***
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> Upon Completion of the Project Main, Customers will provide DIUC with an acknowledged bill of sale transferring them to DIUC, and they shall be and remain the property of DIUC and its heirs and successors, and will be treated as contributed for rate setting purposes.
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> ***
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> Under the circumstances of the need for this agreement, there will be no charge for administrative fees. Upon execution of this agreement and compliance with Its provisions, service will be connected to Customers premises.

Complaint Exhibit, CSA at p. 1.

In response to the Complaint, DIUC filed a responsive letter on November 19, 2018. On December 17, 2018, DIUC filed its Answer requesting the matter be dismissed. A hearing was scheduled and the parties submitted prefiled testimony. On February 27, 2019, Hearing Officer Randall Dong issued Order 2019-22-H requesting the parties submit briefing as to whether the jurisdiction of the Commission extends to the issues raised by the Complaint in this matter.

DISCUSSION

Jurisdiction of the Public Service Commission of South Carolina

Subject matter jurisdiction is "the power to hear and determine cases of the general class to which the proceedings in question belong." *Dove v. Gold Kist, Inc.*, 314 S.C. 235, 237–38, 442 S.E.2d 598, 600 (1994). "The question of subject matter jurisdiction is a question of law." *Gantt v. Selph*, 423 S.C. 333, 337–38, 814 S.E.2d 523, 525–26 (2018), *reh'g denied* (June 27, 2018). The importance of addressing jurisdictional questions accurately and early in a proceeding is necessitated by the fact that "lack of subject matter jurisdiction may be raised at any time, and may [even] be raised for the first time on appeal." *Linda Mc Co., Inc. v. Shore*, 390 S.C. 543, 557, 703 S.E.2d 499, 506 (2010).

It is well established that the Public Service Commission of South Carolina ("the Commission" or "PSC") is a body of limited jurisdiction and has only such powers as are conferred, expressly or by reasonably necessary implication, or such as are merely incidental to the powers expressly granted." *Black River Elec. Co-op., Inc. v. Pub. Serv. Comm'n*, 238 S.C. 282, 292, 120 S.E.2d 6, 11 (1961) (citing *Beard-Laney, Inc. v. Darby*, 213 S.C. 380, 49 S.E.2d 564 (1948) and *Piedmont & Northern Railroad Co. v. Scott et al*., 202 S.C. 207, 24 S.E.2d 353 (1943)).

The limitations upon the Commission's jurisdiction are not treated lightly by the Commission or by South Carolina courts. In fact, when faced with a controversy that does not fall clearly within the confines of its prescribed jurisdiction, the Commission is required to abstain from exercising any power over the controversy:

> Such bodies, [including specifically the South Carolina Public Service Commission], being unknown to the common law, and deriving their authority wholly from constitutional statutory provisions, will be held to possess only such powers as are conferred expressly or by reasonably necessary implication, or such as are merely incidental to the powers expressly granted. See 51 C.J. 36, 37, where among other things it is said: "Any reasonable doubt of the existence in the

> Commission of any particular power should ordinarily be resolved against its exercise of the power."

S.C. Elec. & Gas Co. v. Pub. Serv. Comm'n, 275 S.C. 487, 489–90, 272 S.E.2d 793, 794–95 (1980). Furthermore, in *Piedmont v. Northern Railroad Co.*, the South Carolina Supreme Court cautioned that "the Supreme Court of the United States has pointed out that asserted powers [of regulating commissions] are not to be derived from mere inference. They must be founded upon language in the enabling acts… ." *Piedmont & N. Ry. Co. v. Scott*, 202 S.C. at 223-224, 24 S.E.2d at 360 (1943) (citing *Siler v. Louisville & N. R. Co.*, 213 U.S. 175, 29 S.Ct. 451 (1909) [regarding state commissions] and *Interstate Commerce Commission v. Cincinnati, etc., R. Co.*, 167 U.S. 479, 17 S.Ct. 896 (1897) [regarding federal commissions]).

Determining whether the Commission has jurisdiction, then, requires review of the Commission's enabling statute(s) (ie, the Commission's authority) to determine if the General Assembly intended to provide the Commission jurisdiction over the specific claims raised in the matter. *See Black River Elec. Co-op., Inc. v. Pub. Serv. Comm'n*, 238 S.C. 282, 120 S.E.2d 6 (1961) (South Carolina Supreme Court analyzing the Commission's enabling statutes, the purpose of those statutes, and then determining if the Commission has jurisdiction to act in matter).

The Commission's Enabling Statutes

The sources of the Commission's authority and power relevant to Complaint herein are, as set forth below, S.C. Code Ann. Sections 53-3-140, 58-5-210, 58-5-10(4), 58-5-270, and 58-5-710.

> … [T]he commission is vested with power and jurisdiction to supervise and regulate the rates and service of every public utility in this State and to fix just and reasonable standards, classifications, regulations, practices, and measurements of service to be furnished, imposed, or observed, and followed by every public utility in this State." S.C. Code Ann. § 58-3-140(A).

> The Public Service Commission is hereby, to the extent granted, vested with power and jurisdiction to supervise and regulate the rates and service of every public utility in this State, together with the power, after hearing, to ascertain and fix such just and reasonable standards, classifications, regulations, practices and measurements of service to be furnished, imposed, observed and followed by every public utility in this State and the State hereby asserts its rights to regulate the rates and services of every 'public utility' as herein defined. S.C. Code Ann. §§ 58-5-210.
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> The term "public utility" includes "every corporation and person furnishing or supplying in any manner … water, sewerage collection, sewerage disposal … to the public, or any portion thereof, for compensation…." S.C. Code Ann. § 58-5-10(4).
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> Applications may be made by any corporation, public or private, person … by petition in writing, setting forth any act or thing done, or omitted to be done, with respect to which, under the provisions of Articles 1, 3, and 5 of this chapter, the commission has jurisdiction or is alleged to have jurisdiction. Individual consumer complaints must be filed with the Office of Regulatory Staff…. The commission has jurisdiction to hear complaints regarding the reasonableness of any rates or charges that affect the general body of ratepayers; but the commission may at its discretion refuse to entertain a petition as to the reasonableness of any rates or charges…." S.C. Code Ann. § 58-5-270.
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> The Public Service Commission, upon petition by any interested party, shall have the right to require any person or corporation, as defined in Section 58-5-10, operating a water or sewer utility system … to appear before the commission on proper notice and show cause why that utility should not be required to take steps as are necessary to provide adequate and proper service to its customers. If the commission upon hearing determines that the service is not being provided, it shall issue an order requiring the utility to take steps as are necessary to the provision of the service within a reasonable time as prescribed by the commission. […] S.C. Code Ann. § 58-5-710.

The Relief Requested by the Complainants

The "relief requested" by the Complainants is two-fold: "The customers Halwig and Noller request the Commission require DIUC to immediately restore service through the replacement lines and to compel DIUC to refund the full costs paid by the customers for the replacement lines." Complaint at 3,4,5. Shortly after filing of the Complaint ORS requested that "DIUC immediately restore service to the Complainants with the understanding that restoration of service does not waive any position that any party may take in this matter." Letter, 12-21-2018, Bateman to Boyd; *see also*

Letter, 12-21-2018, Smith to Boyd (stating Complainants concur with ORS letter of 12-21-2018 and "Complainants further confirm that such restoration of service would not waive any position that any party may take in this matter.")

DIUC restored service to the homes. Because DIUC currently provides service to the Hallwig and the Noller residences, the Complainants' have obtained their first requested relief.[1] As such, the claim is moot. *See Sloan v. Friends of Hunley, Inc.*, 369 S.C. 20, 26, 630 S.E.2d 474, 478 (2006) (holding that once FOIA documents produced there is no claim for FOIA violation). Nothing remains to be "ordered" for DIUC to do regarding provision of service; service has been restored and the Commission should not further consider the request. *See Byrd v. Irmo High School*, 321 S.C. 426, 430, 468 S.E.2d 861, 864 (1996); *see also Leventis v. South Carolina Dept. of Health and Environmental Control*, 340 S.C. 118, 133, 530 S.E.2d 643, 651 (2000) (party seeking administrative relief bears the burden of establishing that required conditions of eligibility have been met).

In addition to restoration of service via the newly installed lines, the Complainants also ask this Commission "to compel DIUC to refund the full costs paid by the customers for the replacement lines." Complaint at 3,4,5; *see also* Complaint at 11 ("Continuation of Relief Requested … The PSC should require that DIUC reimburse the Halwigs and the Nollers for all costs paid to replace the mains serving the portion of Driftwood Cottage Lane above the road wash out."). To be clear, the Complainants are asking this Commission to order that DIUC reimburse the Complainants for costs the Complainants voluntarily paid before signing the CSA wherein they

[1] DIUC's position remains unchanged. The Complainants are obligated to pay DIUC for taxes, legal fees, and all costs (including but not limited to legal fees) that DIUC has incurred as a result of this unnecessary proceeding. DIUC reserves the right to pursue all claims and to seek all remedies available to it.

agreed "In order to protect other customers from sharing in the cost responsibility, it would be the responsibility of the affected Customers to have the Project Mains installed in accordance with the plans they solicited from Thomas & Hutton, at their cost." Complaint Exhibit, CSA at 1 (discussed, *supra*, highlighting the Complaint's admission that the CSA specifically "provides that the Halwigs and Nollers were to install the mains at their own expense.").

The Halwigs and Nollers have brought this claim to undo a contract they admit they signed and that they admit obligates them to pay for the facilities they installed. The Complainants actually intend to ask the Commission to make a determination that they entered into the CSA contract under duress and that therefore the Commission should enter an order voiding the contract. *See* Prefiled Rebuttal Testimonies of M. Halwig at 6, N. Halwig at 6, and B. Noller at 6. All three of the Complainants have stated that "the costs of installation were agreed to be paid by" the Complainants per the CSA but that the CSA was made "under duress with no other alternative but to abandon our home." *Id.* Therefore, their goal is a Commission ruling that the Complainants "did not breach the agreement, which [they] were forced into. It was not voluntary, it was extortion." *Id.*

Not only is the request entirely unreasonable and contrary to law, it is far beyond the bounds of this Commission's jurisdiction.

Nowhere in the authorizing legislation of the Commission is there a grant of jurisdiction to hear a contract claim of this nature. This claim has nothing to do with regulation of rates under S.C. Code Ann. § 58-3-140(A). The relief is not covered by the authorization of this Commission to set utility rates pursuant to S.C. Code Ann. § 58-5-210. Additionally, even though this matter is before the Commission via what has been characterized as a customer complaint, the claims are

not "regarding the reasonableness of any rates or charges that affect the general body of ratepayers," as authorized for Commission jurisdiction by S.C. Code § 58-5-270.

The Commission recently considered the extent of its jurisdiction when a shareholder sought to intervene in a pending matter involving SCE&G and Dominion Energy. *See* Order No. 2018-339, *Joint Application & Petition of S.C. Elec. & Gas Co. & Dominion Energy, Inc. for Review & Approval of A Proposed Bus. Combination*, No. 2017-370-E, 2018 WL 2264265, at *1 (May 9, 2018). The shareholder wanted the Commission to hear his claims regarding the companies' contractual and fiduciary obligations to him, specifically that the relief requested in the matter before the Commission would result in an undervaluing of his stock in SCANA. The Commission reaffirmed that its jurisdiction is limited by S.C. Code Ann. § 58-3-140(A) finding that a claim beyond that statutory grant

> … cannot confer jurisdiction on the Commission where the South Carolina Code of Laws does not. Under S.C. Code Ann. § 58-3-140(A), the Commission's jurisdiction is grounded in our authority to supervise and regulate the rates and service of public utilities and to fix just and reasonable standards, classifications, regulations, practices, and measurements of services. Mr. Miller's interest as a shareholder is not included in this statutory provision.

Id. Likewise, here the request for Commission interpretation of a private contract cannot be brought within the Commissions limited jurisdiction just because the contract involves a ratepayer as a party. To be proper for determination, issues must relate to one of the Commission powers enumerated in the statutory grant of jurisdiction. This matter does not.

This recent decision in Order No. 2018-33 is also in accord with previous rulings of the South Carolina appellate courts. For example, in *Lindler v. Baker*, 280 S.C. 130, 131–32, 311 S.E.2d 99, 100 (Ct. App. 1984), the South Carolina Court of Appeals found the court of common pleas, not the Commission, has jurisdiction to hear contractual disputes, even if one of the benefits allegedly bargained for in the contract involves provision of sewer services. That is because the

matter at issue is a party's request for interpretation of a contract, not rate setting. The Court in *Lindler* held:

> The question here does not involve the reasonableness of a sewer service rate [*see Carolina Water Service, Inc. v. S.C. Public Service Commission*, 272 S.C. 81, 248 S.E.2d 924 (1978)]; rather it concerns who, because of the lease agreement and purchase contract, must bear the expense of sewer service fees regardless of the amount. Certainly the court of common pleas has jurisdiction to enforce the appellants' alleged contractual right to cost-free sewer service.

Lindler v. Baker, 280 S.C. 130, 131–32, 311 S.E.2d 99, 100 (Ct. App. 1984). Reversing the trial court, the Court of Appeals ruled that the lower court erred in viewing the complaint as one that raised the narrow question of "the reasonableness of a rate charged by a public utility, which, under Section 58–5–210 of the South Carolina Code of Laws (1976)" would have properly been within the Commission's jurisdiction. *Id.*

In making its decision in *Lindler*, the Court of Appeals cited to *Martin v. Carolina Water Services, Inc.*, 273 S.C. 43, 254 S.E.2d 52 (1979), wherein the South Carolina Supreme Court addressed another contract between a utility and a ratepayer. Despite the contract's involvement of a ratepayer and a utility, the Court found the contract was not within the Commission's jurisdiction:

> We are of the opinion that the real issue involved in this action is not whether the court of common pleas has jurisdiction to determine rates, but rather whether it has jurisdiction to enforce the payment of the compensation defendant agreed to pay for the property it bought. [Later regulation of one of the parties by the Public Service Commission] would not divest the plaintiff of his right to collect the consideration which the defendant contracted to pay. A part of that consideration was cost free tap-on connections.

Martin v. Carolina Water Servs., Inc., 273 S.C. 43, 46, 254 S.E.2d 52, 53 (1979). Similarly, here, again, the matter at issue is Complainants' request that the Commission interpret their rights under the Customer Service Agreement. The essential question is not whether a regulated utility or a regulated service are at issue in the contract; instead, the Commission must consider first whether

the issue to be decided is within the Commission's jurisdictional grant. In this case, the Complainants' request for contract interpretation is not within the Commission's jurisdiction.

CONCLUSION

The Complainants seek two things in their Complaint. First, they seek activation of their services which has been achieved thereby rendering the claim moot. Second, the Complainants request this Commission order that they were under duress or somehow extorted to enter into the CSA and therefore the CSA should be voided. Additionally, they ask the Commission for the extraordinary relief of an order requiring DIUC to pay them over $100,000. This contract claim and its demand for relief are beyond the Commission's statutorily prescribed jurisdiction. Accordingly, this Commission should abstain from exercising any power over the Complaint and dismiss the same.

Respectfully submitted,

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